IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 469

MANUEL PELELAS,

*Petitioner,*

*vs.*

CATERPILLAR TRACTOR CO.,

*Respondent.*

## BRIEF OF RESPONDENT, CATERPILLAR TRACTOR CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## INDEX.



### Table of Cases.



### Texts.



### Federal Rules of Civil Procedure.



### Statutes.

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## OPINION OF COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 113 Fed. (2d) 629.

The opinion of the United States District Court for the Southern District of Illinois, Northern Division, is reported in 30 Fed. Supp. 173.

### Jurisdictional Grounds.

Plaintiff recites (Petitioner's brief, p. 5) that this court has jurisdiction hereof, pursuant to Section 240 of the Judicial Code, as amended by Act of Congress, February 13, 1925 (c. 229, Sec. 1, 43 Stat. 1938).

### Statement of the Case.

Plaintiff brought what he termed a "spurious" class action (R. 76) in which he sought to represent a class consisting of many thousands of persons (R. 51, 59), insured under a group policy of insurance issued to

Respondent by the Metropolitan Life Insurance Company.

The trial court permitted plaintiff to file an original and two amended complaints (R. 2, 14, 50, 56, 80).

The only persons eligible to become insured under the group policy are employees of Respondent who are actively at work (R. 23). Upon an employee's leaving his employment, his group insurance ceases (R. 24). Plaintiff's suit was filed June 24, 1939 (R. 5). He had been neither insured under the group policy nor employed by Respondent since November, 1936 (R. 57, 77, 80).

The Respondent—Employer—alone contracted to pay, and became liable for, the entire premium to the Metropolitan Life Insurance Company (R. 17, 19, 28). Eligible employees electing to become insured under the group plan contributed a portion of the cost thereof to Respondent Employer (R. 38). The amount of their contribution to the cost varied according to the benefits selected (R. 37).

Respondent Employer presented the group insurance plan to its many thousands of employees through its "Company's Announcement" (Plaintiff's Exhibit 2, R. 39, 61, 77, 78, 79). Thereafter, over seventy-five per cent of Respondent's employees voluntarily elected to become insured under the presented plan (R. 38).

Plaintiff elected to become insured under the group plan on January 1, 1932 (Plaintiff's Exhibit 2, R. 39) and applied to the Metropolitan Life Insurance Company for insurance thereunder by executing a written application for such insurance, in which he expressly applied therefor "in accordance with the Company's announcement" (Plaintiff's Exhibit 2, R. 39).

Plaintiff's statement (Petitioner's brief, p. 7) that the

employees contributed the greater part of the premium cost and that Respondent contributed the "small portion remaining" rests, despite the liberal provisions for discovery now afforded by the rules, none of which were availed of by plaintiff, upon allegations founded wholly upon information and belief (R. 51).

Plaintiff's statement (Petitioner's brief, p. 8) that insured employees did not know that dividends were to be paid, or had been paid, has no foundation in the record.

Plaintiff's statement (Petitioner's brief, p. 8) that his action is brought to impress a "constructive trust" upon the dividends paid to Respondent is entirely incorrect. Each of his three complaints (R. 2, 14, 50) sought to base his alleged right to recover dividends upon the provisions of the group policy. The District Court (R. 56) held that:

> "The plaintiff, however, relies wholly upon the provisions of the Master Policy * * *" (R. 61).

The Circuit Court of Appeals held that:

> "This policy was attached to and incorporated in the complaint, and, consequently, is controlling in determination of the sufficiency of plaintiff's pleading * * *" (R. 77).

Plaintiff alleged in paragraph six of his first and his second amended complaint (R. 15, 51) and in paragraph four of his original complaint that the provisions of the group policy entitled him to recover a proportionate share of the dividends (R. 3).

The judgment of the District Court rested wholly and only upon two grounds:

> (a) "Plaintiff is not properly representative of the class on whose behalf he purports to sue."
>
> (b) Plaintiff's second amended complaint "does not state a claim upon which the relief prayed for can be granted" (R. 62).

# ARGUMENT.

## SUMMARY.

### I.

**The Questions Involved Herein Do Not Come Within the Purview of Rule 38-(5) of This Court.**

### II.

**Plaintiff Here Seeks to Reverse Completely His Theory of Recovery as Pleaded and Argued in the Lower Courts.**

### III.

**If the Relationship of Principal and Agent Existed, Plaintiff Has Wholly Failed to Plead Either Its Existence or the Terms Thereof.**

### IV.

**Plaintiff Is Not Such an Individual as Will Fairly Insure the Adequate Representation of All Those Persons Comprising the Alleged Class on Behalf of Which He Volunteers to Sue.**

## QUESTIONS INVOLVED.

### I.

**The Questions Involved Herein Do Not Come Within the Purview of Rule 38-(5) of This Court.**

The opinions in this case decide two elementary questions:

*First,* That plaintiff's pleadings *in this particular case* do not entitle him to the relief prayed for.

*Second,* That plaintiff is not such an individual as "will fairly insure the adequate representation of all" those persons comprising the alleged class on behalf of which he volunteers to sue, as required by the provisions of Rule 23-a of the Federal Rules of Civil Procedure.

This case does not involve a question in which a state court has decided a federal question of substance not theretofore determined by this court.

This case does not involve a question which has been decided by a state court in a way probably not in accord with applicable decisions of this court.

This case does not involve a question wherein a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.

This case does not involve an important question of local law decided in a way probably in conflict with applicable local decisions.

This case does not involve an important question of federal law which has not been, but should be, settled by this court.

This case does not involve a federal question decided

by a Circuit Court of Appeals in a way probably in conflict with applicable decisions of this court.

This case does not involve a question decided by the Circuit Court of Appeals in such a manner that that court has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision.

No provision of the federal constitution is involved.

No provision of a state constitution is involved.

No federal statute is involved.

No state regulation or municipal ordinance is involved.

This case is not such, therefore, as is contemplated or described by Rule 38-(5) of this Honorable Court.

## II.

### Plaintiff Here Seeks to Reverse Completely His Theory of Recovery as Pleaded and Argued in the Lower Courts.

In both the District and the Circuit Court of Appeals plaintiff bottomed his alleged right to recover solely upon the participation clause of the group policy. The District Court held (R. 61):

> "The plaintiff, however, relies wholly upon the provisions of the master policy * * *."

The Circuit Court of Appeals found (R. 77):

> "This policy was attached to and incorporated in the complaint, and, consequently, is controlling in determination of the sufficiency of plaintiff's pleading * * *."

Plaintiff here states in his petition at page 8:

> "Plaintiff seeks by this action to impress a constructive trust upon the dividends received by Caterpillar Company from the insurance company and to compel Caterpillar to disgorge."

In his argument, at page 16 of his brief, plaintiff says:

> "However, as we have pointed out before plaintiff does not rely upon contract."

Despite such assertions, which are repeated throughout plaintiff's petition, plaintiff, always referring to the group contract, states (Petitioner's brief, p. 15):

> "The Participation Clause points the way to the operation of equity."

On the same page plaintiff further states:

> "We believe that the reasonable interpretation of this clause [the Participation Clause] is that the employer should distribute the divisible surplus received to those who have contributed to the payment of the premiums, in proportion to their contributions."

Plaintiff further states (Petitioner's brief, p. 16):

> "If the Participation Clause is ambiguous, then it ought to be construed here favorably to the insured."

Plaintiff further states (Petitioner's brief, p. 22):

> "Although utterly disregarded by the Circuit Court, this section [Incontestability Clause] is controlling."

All of the above-quoted statements of plaintiff in his petition are entirely inconsistent with his statements that he does not rely upon a contract to recover here.

In paragraph four of his original complaint (R. 3), in paragraph six of his first amended complaint (R. 15), and in paragraph six of his second amended complaint (R. 51), plaintiff alleged:

> "*The contract of insurance* was what is commonly known as a participating contract and *provided* in substance that the Insurance Company should annually ascertain and apportion any divisible surplus accruing and *providing further* that such divisible surplus should be distributed to the parties contributing the premiums, in proportion to the amounts of such contribution."

The above allegation of the ~~amounts~~ contents of the Group Contract constitute the very core and heart of plaintiff's case.

The theory now advanced by plaintiff was not argued, considered, or decided in either lower court. His pleadings were based—and the case considered—upon the Group Contract alone. The deciding factor here, however, is that plaintiff's present position is directly counter to his pleadings. In such a situation, an Appellate Court

> "will not, ordinarily, consider matters which were not presented to the trial court or passed upon therein, even for the purpose of advising the trial court of the action it ought to take on their being subsequently presented for consideration." (American Jurisprudence, Vol. 3, p. 361, sec. 820.)

## III.

**If the Relationship of Principal and Agent Existed, Plaintiff Has Wholly Failed to Plead Either Its Existence or the Terms Thereof.**

The relationship of the Respondent and its employees, with respect to this insurance, springs from the presentation and operation of the group insurance plan. *The documents evidencing the engagements of Respondent in the presentation and operation of the plan, however, have not been pleaded.*

Plaintiff admits that the plan was "presented" to Respondent's employees (Petitioner's brief, p. 6). He has chosen, however, not to plead either the terms or method of such "presentation".

Plaintiff has pleaded and is forced to admit that he applied for group insurance "in accordance with the Company's announcement" (Plaintiff's Exhibit 2, R. 39). He has likewise chosen not to plead the terms of such "announcement". On the contrary, although pleading its ex-

istence in one complaint, he seeks to deny its existence in another (R. 52).

Plaintiff admits that his contributions were deducted pursuant to the terms of "wage deduction authorizations" (Petitioner's brief, p. 7). Again, he has chosen not to plead the terms of such "wage deduction authorization".

It is apparent that the relationship between Respondent and its employees with respect to the group insurance plan was set out and made known by Respondent through its "presentation", its "announcement", and the "wage deduction authorization". Plaintiff, although having been an employee of Respondent and having had the group insurance plan "presented" to him through the "Company's announcement" and having executed a "wage deduction authorization" chose not to reveal the contents or terms of any of them. Reason compels the inference that there is a motive for such pleading. Likewise, reason compels the inference that had the terms and provisions of these various documents been pleaded, the question here presented would have been resolved contrary to plaintiff's contentions in this case.

Plaintiff's method of pleading in this case has resulted in leaving the record barren of even a suspicion as to the terms or contents of any engagements undertaken by Respondent in connection with the group insurance plan. For that reason plaintiff was not permitted in the lower courts, and should not be permitted here, to claim a breach of that which he voluntarily has chosen not to disclose in his pleading.

Plaintiff argues (Petitioner's brief, p. 22) that because of the contents of the Incontestability clause of the group policy, the Company's announcement or presentation is no part of any contract between Respondent and its em-

ployees. The portion of the Incontestability clause relied on is as follows:

> "SECTION 6. *Incontestability.*—This policy * * * the application of the Employer * * * and the individual applications—if any—of the Employees, constitute the entire contract between the parties. * * *"

This clause deals only with the contract between the Insurance Company on the one hand and the employer on the other; and between the Insurance Company on the one hand and the employees on the other. It does not deal with, nor attempt to define what constitutes undertakings or agreements between Respondent Employer and its employees. It is impossible to follow plaintiff's argument that he does not rely upon the Group Contract to recover, when at the same time he relies upon the Incontestability clause thereof to determine what is and is not a part of the contract. The utter confusion of plaintiff's argument is made apparent by reference to the record. The Incontestability clause provides that the "individual applications—if any—of the employees" constitute a part of the Group Contract. The "individual application" of plaintiff has been attached by him as an exhibit to his complaint (Plaintiff's Exhibit 2, R. 39). His "individual application" states that he applies for group insurance "in accordance with the Company's announcement". Plaintiff's argument, therefore, that the Company's announcement forms no part of the Group Contract might be of force in a suit against the Insurance Company. The suit here, however, is not against the Insurance Company on its Group Policy; it is against the Insured Employer; and no provision of the Group Contract is intended to, or can, serve to limit the engagements which the Group Employer may have with his employees.

## IV.

**Plaintiff Is Not Such an Individual as Will Fairly Insure the Adequate Representation of All Those Persons Comprising the Alleged Class on Behalf of Which He Volunteers to Sue.**

The entire theory of class representation is a dangerous exception to the general rule that each interested person must be made a party by name, notified of the proceedings, and given his day in court. Courts have always, therefore, made absolutely certain, in advance, that the parties seeking to represent a class must be selected with such care and have such a personal interest in the litigation as to guarantee that the rights of all will be fully protected.

The District Court held two pre-trial conferences and heard two oral arguments pertaining to this case (R. 56). Through these conferences and arguments the trial court was in a better position to gauge the tenor of this litigation and the capacity of plaintiff to represent the class than can a reviewing court, despite any briefs counsel may write on the subject.

The Circuit Court of Appeals, speaking of plaintiff's status and of the holding of the District Court with reference thereto said (R. 79):

> "Moreover, we think the District Court was fully justified in finding that plaintiff did not fairly insure the adequate representation of those he proposed to represent, as required by Rule 23-(a) of the Rules of Civil Procedure."

The discretionary finding by the District Court that Manuel Pelelas is not such a person as is contemplated by Rule 23-(a), which finding was based upon an ample record, and concurred in by the Circuit Court of Appeals, will not, except for abuse, be disturbed by a reviewing

court. (See American Jurisprudence, Vol. 3, p. 522, sec. 959; Corpus Juris Secundum, Vol. 5, p. 477, sec. 1586.)

**Conclusion.**

The decisions in this case were based upon the insufficiency of plaintiff's pleadings and upon the fact that the status of the plaintiff here is not such as to meet the requirements of Rule 23-(a) of the Federal Rules of Civil Procedure.

The plaintiff here, through the use of captious argument and a complete departure from all practical aspects of group insurance, has attempted to impress this court that this case presents a question which it should decide. It is respectfully submitted, however, that if such a question were presented, it should be decided by this court in a case wherein the pleadings are clear and all facts have been revealed after full hearing upon the merits.

Plaintiff's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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